Nos. 266, 227.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 266.

CENTRAL-ILLINOIS SECURITIES CORPORATION and CHRISTIAN A. JOHNSON

v.

SECURITIES AND EXCHANGE COMMISSION, THOMAS W. STREETER, *et al.*, THE HOME INSURANCE CO., *et al.*

No. 227.

THOMAS W. STREETER, *et al.*,

Petitioners,

v.

CENTRAL-ILLINOIS SECURITIES CORP., C. A. JOHNSON, LUCILLE WHITE, and FRANCES BOEHM.

BRIEF OF THOMAS W. STREETER, *ET AL.* IN OPPOSITION TO CROSS-PETITION OF CENTRAL-ILLINOIS SECURITIES CORP., *ET AL.* AND IN REPLY TO BRIEFS OPPOSING PETITION OF THOMAS W. STREETER, *ET AL.*

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Opinions Below.

The opinion of the Court of Appeals (R. 12) and the opinion denying the prayers of the petitions and cross-petition for rehearing (R. 138) are reported in 168 F. (2d) 722. The opinion of the District Court (R. 283a) is reported in 71 F. Supp. 797. The findings and opinion (R. 25a) and supplemental findings and opinion of the Securities and Exchange Commission (R. 128a) have not yet been officially reported but are set forth in the Commission's Holding Company Act Releases Nos. 7041 and 7119, respectively.[1]

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[1] As the jurisdictional statement and the statute involved appear in the Streeter petition, pp. 2-5, it is requested that they be deemed incorporated herein.

Statement.

The petition previously filed on behalf of Thomas W. Streeter, *et al.* contains a complete statement of the case, to which the attention of this Court is respectfully directed and which it is requested be deemed incorporated herein.[2]

While it is not appropriate to argue the merits of the case at this time, we believe that we can assist the Court in its consideration of the three petitions by commenting, even if only briefly, on several of the major contentions in the two opposing briefs, independently submitted on behalf of two groups of common stockholders.[3] As demonstrated in the aforesaid three petitions, two issues basic to the proper administration of the Public Utility Holding Company Act,—the function of the district court vis-a-vis the Commission and the significance of the fair and equitable standard—have been raised and require resolution by this court. Furthermore by indirection the cross-petition filed by the common stockholders, Central-Illinois Securities Corp. *et al.*,[4] constitutes an admission that the decision below raises "substantial issues in the administration

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[2] *Thomas W. Streeter, et al.* v. *Central-Illinois Securities Corp., et al.*, October Term, 1948, No. 227, (hereinafter called the "Streeter petition"), pp. 7-16. In addition, petitions have also been filed on behalf of the Securities and Exchange Commission and The Home Insurance Company, *et al.*, Nos. 226 & 243, respectively.

[3] Memorandum of Respondents Lucille White and Frances Boehm in Opposition to Appellants' Petitions and Brief of Respondents Central-Illinois Securities Corporation and C. A. Johnson, in Opposition (hereinafter called the "White opposition brief" and the "Central-Illinois opposition brief", respectively.)

[4] *Central-Illinois Securities Corp., et al.* v. *Securities and Exchange Commission, et al.*, October Term, 1948, No. 266 (hereinafter called the "Central-Illinois cross-petition").

of the Public Utility Holding Company Act" and a recognition that "important questions arising from the judgment"[5] of the court below exist. In addition, since the Central-Illinois cross-petition raises questions on which the views of the preferred stockholders have hitherto not been set forth for this Court, we believe that the presentation of the position of the Streeter group will serve a purpose in assisting the Court in its consideration and facilitating its disposition of that cross-petition. Accordingly, this memorandum will be devoted to presenting the Streeter group's views (I) in opposition to the Central-Illinois cross-petition and (II) in reply to the briefs opposing the Streeter petition.

I. In Opposition to Central-Illinois Cross-Petition.

A. Questions Presented.

1. Did the court below properly vacate the decree of the District Court and remand the proceedings to the Securities and Exchange Commission for appropriate action where the plan was disapproved as not being fair and equitable within the purview of section 11(e) of the Public Utility Holding Company Act?

2. Does a fair and equitable plan under section 11(e) which provides for the payment to the preferred stockholders of an amount equal to the redemption price established as the equitable equivalent of the rights surrendered contravene the Public Utility Holding Company Act or the Fifth Amendment to the Constitution, where the involuntary liquidation clause

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[5] Central-Illinois cross-petition, p. 18.

of the charter limits the preferred stockholders to face value?

B. Reasons for Denying Writ.

The Central-Illinois cross-petition raises no substantial issues affecting the administration of the Public Utility Holding Company Act (hereinafter called the "Act"). Its cross-petition primarily questions the propriety of the remand on the valuation aspect. In this respect, no conflict between the decision of the court below and the decision of other courts of appeals is disclosed. The cross-petition cites no decision of any court directly in point that conflicts with the opinion of the court below as to the requirement of remand. Likewise, no substantial issue exists with respect to the alleged violation of the Act or Fifth Amendment.[6]

C. Argument.

1. Assuming *arguendo* the unfairness and inequity of the plan, the court below properly vacated the decree of the District Court and directed the remand of the proceedings to the Securities and Exchange Commission.

The Streeter group maintains that the Securities and Exchange Commission (hereinafter called the "Commission") correctly determined that the preferreds have a fair investment value at least equal to the call price and that fairness and equity require the payment to the preferreds of that amount. If, however, this Court concludes that the Commission erred in its valuation, then the question of remand comes to the fore. Accordingly, the Streeter group has assumed, only for the sake of argument, that the payment to the preferreds of an amount equal to the call

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[6] The same contention made by the White group (opposition petition, p. 8) is likewise without merit.

prices is not fair and equitable, but have challenged this determination in the petition.[7]

Granting *arguendo* the District Court's determination "that because of the provision for the payment of premium,[8] the plan does not meet the requirements of fairness and equity" (R. 292a), nevertheless the District Court had no power to rewrite or amend the plan so as to reduce, on the basis of its own estimates and valuation, the quantum of participation accorded to the preferred stockholders under the plan submitted by the Commission, and then to approve and enforce the plan as so amended by it. In other words, since the District Court had in effect disapproved the plan submitted as unfair and inequitable,[9] it had no choice but to reject the plan, deny enforcement and remand to the Commission for appropriate action. Its failure so to do constituted a reversible error, for

[7] In addition to challenging the significance of the fair and equitable standard as determined by the court below, the Streeter petition also questions the standard of review as applied in testing the valuation reached.

[8] The reference of the District Judge (Leahy, *J.*) to "premium" is an inaccurate characterization, as the plan does not call for the payment of a "premium" as such, but an amount equivalent to the redemption price. Such reference reflects a "nominal" approach which, although begging the question, is frequently used by the common stockholders. Moreover, the same District Judge on another occasion in his decision in *In re Cities Service Co.*, 71 F. Supp. 1003 (D. Del., 1947) rendered shortly after his opinion in the instant case views the payment of the amount in excess of the face value as "premium" only where the equitable equivalent is cash, and not other securities, even though such securities are deemed the equivalent of money; and in the same opinion, payment of the excess in the form of securities was justified on the basis of the medium used to satisfy the claim. This distinction in treatment based upon the medium of payment—cash or kind—is without substance and was properly rejected by the court below (R. 38). It is well settled that compensation may be made either in cash or kind (Streeter petition, p. 39, n. 30).

[9] In its opinion on rehearing, the court below indicated that the "District Court found the plan to be unfair and inequitable and rejected it" (R. 149).

which the court below correctly vacated the District Court's decree and directed the remand to the Commission for its action (*i. e.*, valuation).[10] Such was the determination of the court below when it said:

> "Though a district court of the United States sitting pursuant to the provisions of Section 11(e) may reject a plan, it cannot value the securities, find equitable equivalents therefor and substitute its own estimates for those of the Commission requiring the plan as amended by it to be carried out. To put the matter briefly, a district court may reject but not amend the plan. The court below, therefore, erred in one particular. It entered an order approving and enforcing the plan as amended by it. It was without power to do this. The provisions of Section 11(e) make it clear that the Commission in the first instance must approve the plan and find it to be fair and equitable. If, as here, the district court disagrees with the conclusion of the Commission that the plan is fair and equitable, it must refuse to approve the plan and 'remand' the record to the Commission for further and appropriate action by it" (R. 39).

The principle enunciated by the court below that a section 11(e) court may disapprove and reject a plan, but not amend and then approve it has been uniformly applied by the courts. *In re Laclede Gas Light Co.*, 57 F. Supp. 997 (E. D. Mo., 1944), aff'd *sub nom. Massachusetts Mutual Life Ins. Co. v. S. E. C.*, 151 F. (2d) 424 (C. C. A. 8, 1945), cert. den. 327 U. S. 795; *In re Kings County Lighting Co.*, 72 F. Supp. 767 (S. D. N. Y., 1947), aff'd *sub nom. Public Service*

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[10] In referring to the action to be taken by the Commission, the court below said:

> "* * * The problem is and will remain, until its disposition by the Commission, one of valuation of the securities of Engineers, *viz.*, the preferreds and the common" (R. 40).

Commission of N. Y. v. S. E. C., 166 F. (2d) 784 (C. C. A. 2, 1948); *In re Electric Bond & Share Co.*, 73 F. Supp. 426 (S. D. N. Y., 1946). A district court cannot (as the instant District Court attempted) approve a plan in part and disapprove it in part.[11] Furthermore, it cannot rewrite the plan and then approve.[12] Accordingly, the District Court in the case at bar did not have the power to amend the plan so as to reduce the compensation proposed to be paid to the preferred stockholders any more than it could change the method of payment from cash to kind, or modify any other part of the plan.[13] Nor was it free to change any of the provisions as to the stockholders'

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11 Thus in the *Laclede Gas case, supra*, the District Court said:

"* * * The Court of Appeals may—'affirm, modify, or set aside such order, in whole or in part.' No such power is given to this Court under Section 11(e) proceedings. This Court can only 'approve' or disapprove of the plan" (57 F. Supp. 1002).

12 Thus in *In re Electric Bond & Share Co., supra*, it was held:

"The province of the District Court in a §11(e) enforcement proceeding is that of a reviewing authority. *Okin v. S. E. C.*, 2 Cir., 1944, 145 F. 2d 206. The Court cannot *amend* or *modify* the plan and then enter an order of approval since §11(e) provides that the plan must in the first instance be approved by the Commission. The function of the Court is to approve and enforce the plan of reorganization submitted to it, if it finds such plan fair and equitable and appropriate to effectuate the purposes of the Act. To do this the Court must examine the plan and the record upon which the Commission's approval of the plan was based. To judge the plan on any other record would run counter to the procedure expressed in the statute" (73 F. Supp. 443). (Italics ours.)

13 That such amendment is not permitted is evident from the following statement by the District Court in the *Kings County* case, *supra*:

"* * * I agree thoroughly with the position taken by counsel for the State Commission that, under my narrow

[Footnote continued on following page.]

rights under the plan.[14] Unquestionably, any change in the quantum of participation to be accorded the stockholders necessarily alters substantial rights. That fact cannot be changed by the mere repetitious assertion that the feature of the plan affecting stockholders' participation does "not go to the heart of the plan".[15] The history of the litigation in the instant case[16] and

[Footnote continued from preceding page]

statutory jurisdiction I could not *amend* a proposed plan. For example, I could not, in the case at bar approve the plan on condition that Long Island receive, not 7½% of its present common stock holding, but 3¾%, this representing a compromise between the views expressed by the two commissions. Any such disposition would be wholly without jurisdiction" (72 F. Supp. 774).

[14] In the *Public Service Commission* case, *supra*, which affirmed the *Kings County* case, *supra*, the Court of Appeals for the Second Circuit apparently imposed a stricter limitation upon the district judge's power of approval, stating:

"We will take up the last objection first. We may assume for argument that the judge's power was limited to an approval or a rejection of the plan, as it stood. He held that, nevertheless, the condition that the plan should be submitted to the PSC for its approval was not an 'essential' part of the plan, and that for this reason he was free to disregard it. *In this he was right, not indeed because he would have been free to change any of those provisions for the issue of securities or the alteration of shareholders' rights which made up the plan, which he thought not to be 'essential';* but because, as we shall show, §11(e) did not require the consent of the PSC, and because submission to that commission was not part of the plan at all; but, as it itself declared, only one of the 'steps to be taken to make the amended plan effective'" (166 F. (2d) 786). (Italics ours.)

[15] Central-Illinois cross-petition, pp. 20, 22.

[16] This feature has been sharply litigated before the Commission and the two courts below. Thus, in the first instance, inadequate compensation to the preferred resulted in the Commission's refusal to approve the plan unless and until amended to increase the participation of this group (R. 73a). In turn this increased participation gave rise to objection by two common stock groups before two courts below to the enforcement of the amended plan.

in the other cases arising under section 11(e) amply demonstrates the significance of this issue concerning the treatment of stockholders' claims. Central-Illinois' efforts to minimize the importance of the compensatory aspect of the plan is manifestly ridiculous.

Likewise, this principle limiting the district court's power to amend a plan has been applied to analogous situations arising under section 77 of the Bankruptcy Act. Thus in section 77 proceedings, where the district court's approval is required in all cases, that court can only pass upon such plans as are certified to it[17] and has no power to amend the plan,[18] but is limited to approval or disapproval, in which latter event it must either dismiss the proceedings or refer the plan to the Interstate Commerce Commission.[19] Furthermore, even the "interest of speed" or expedition does not justify the judicial amendment or modification of a plan submitted by the Commission. *In re Alton R. Co.*, 159 F. (2d) 200 (C. C. A. 7, 1947);[20]

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[17] *In re New York, N. H. & H. R. Co.*, 27 F. Supp. 392 (D. Conn., 1938), aff'd 104 F. (2d) 1018 (C. C. A. 2, 1939).

[18] *In re New York, N. H. & H. R. Co.*, 54 F. Supp. 595 (D. Conn., 1943), aff'd in part and rev'd in part on other grounds 147 F. (2d) 40 (C. C. A. 2, 1945) cert. den., 325 U. S. 884 (1945).

[19] *In re Erie R. Co.*, 37 F. Supp. 237 (D. Ohio, 1940).

[20] Thus, in the *Alton* case, *supra*, where the District Court in the interest of speed rewrote certain provisions of the plan after its approval by the Interstate Commerce Commission and the security holders, the Court of Appeals reversed the District Court order, rejecting the argument as to the District Court's authority to rewrite in connection with its supervision of the execution of the plan.

The *Alton* case, we believe, cannot be distinguished from the instant case, in which the plan as approved by the Commission and submitted to the court contained none of the provisions concerning the treatment of the preferred stockholders which were incorporated by Paragraph 6 of the court's order (R. 321a). Nor does the District Court's desire for speed in the instant case justify its attempt to change the plan any more than in the *Alton* case.

In re Chicago, R. I. & P. Ry. Co., 162 F. (2d) 257 (C. C. A. 7, 1947).

In addition, the Commission's amendatory order of February 11, 1947 and the District Court's adoption of the escrow resulted in the restoration of the splitting features of the original plan,[21] after they had been withdrawn, by separating part of the plan it disapproved and so constituted substantive changes of valuable rights[22] without authority in law so to do, as indicated above (pp. 7-8). In any event the Commission's amendatory order and its consent to the escrow do not satisfy the statutory requirement of approval by both the Commission and the district court.[23] Nor can this requirement be waived by either the Commission or the district court. So stated the court below in the following language:

> "* * * we are of the opinion that neither the Commission, nor the District Court, nor this court possesses the power to waive the provision of Section 11(e) providing for approval of a plan of reorganization as fair and equitable by the Commission and by the District Court. Moreover, we cannot treat the Commission's amendatory order of February 11, 1947 or its approval of the escrow agreement as a rejection of the role imposed on the Commission by Congress. The cor-

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[21] Although counsel for Engineers had made a motion to separate Parts I and II of the plan and for an order permitting the consummation of Part I, the Commission found that it could not grant the motion to split the plan, but stated that it would approve an amendment to provide for escrow in the event of further litigation as to the rights of the preferred stockholders (R. 75a).

[22] The Commission does not view the amendatory order as an amendment to the plan (R. 169a, 389a).

[23] The Central-Illinois group has implicitly recognized in its opposition brief (pp. 13-14), that the Commission has not approved the plan in the form approved and enforced by the District Court despite their present elaborate argument as to the existence of the concurrent approval in its cross-petition (pp. 22-23). See also White opposition brief, p. 15.

rectness of our position in this regard is demonstrated by the fact that the amendatory order of the Commission provides that the escrow agent may make payment to the preferred stockholders only when the order of the District Court has become final and not subject to appeal. What the Commission intended to effect by the order was nothing more than the establishment of a means for expediting the execution of the plan of reorganization when the approval required by the statute had been attained" (R. 139).

As the District Court has disapproved the plan as unfair and inequitable and the requisite concurrent approval is lacking, the District Court was required to remand the cause to the Commission for appropriate action. This procedure which the court below correctly ordered has been uniformly followed. *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80 (1943); *Schwabacher* v. *U. S.*, 334 U. S. 182 (1948). Both of these Supreme Court cases involved the treatment to be accorded stockholders under a statutory reorganization plan. Thus in the first *Chenery* case, *supra*, where an order of the Commission approving a reorganization plan under the Act was reversed as based upon inapplicable judicial precedents, this Court directed the remand to the Commission for appropriate action in accordance with its opinion. Similarly, in an analogous situation in the *Schwabacher* case, *supra*, this Court again directed a remand to the Interstate Commerce Commission for reconsideration as that Commission may have failed to consider the effect of certain rights of stockholders upon the "intrinsic or market values". In view of the foregoing authorities, as to which no conflict has been shown to exist, the decision of the court below correctly requires the remand to the Com-

mission for valuation in accordance with its opinion, where the plan has been disapproved.[24]

2. The Act and Fifth Amendment do not bar payment to preferred stockholders under a fair and equitable plan of an amount equal to the redemption price established as the equitable equivalent of the rights surrendered, in the face of the limitation of the preferred to stated value under the charter involuntary liquidation provision.

The standard of fairness and equity incorporated in section 11(e) of the Act imposes the outer limits upon plans thereunder. By adoption of that standard, Congress has in substance decreed that in achieving the objectives of the Act a plan must not produce unfair results. If adherence to charter provisions, such as an involuntary liquidation clause, has that effect, such provisions may not stand in the way of the Congressional objectives.[25] However, the threat of the due process barrier of the Fifth Amendment to the Constitution is in the instant case unwarranted. The constitutional question is no more "reached" here than in *Otis & Co.* v. *S. E. C.*, 323

[24] As noted above, the question of remand has been argued on the assumption that the disapproval of the plan was correct, but that disapproval has been challenged in the Streeter petition.

[25] *North American Company* v. *S. E. C.*, 327 U. S. 686, 705 (1946); *Continental Insurance Co.* v. *U. S.*, 259 U. S. 156, 171 (1922). In the *North American* case, *supra*, this Court said:

> "This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U. S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act."

U. S. 624 (1945). Even if it were, the short answer to such arguments is found in *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90 (1946) and the *North American Company* v. *S. E. C.*, 327 U. S. 686 (1946).[26] The implication from these cases is clear that where under a plan security holders receive "just compensation" for their interest, the due process requirements are satisfied. The substitution of the equitable equivalent for contract rights surrendered involves no destruction of values but merely a change in the form of investment to another of equal value. Accordingly, neither the Act nor the Constitution forbids payment to the preferred of an amount equal to its redemption price established as the equitable equivalent of the rights surrendered under a fair and equitable plan.

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[26] In the *American Power & Light* case, *supra*, this Court rejected the argument that Section 11 (b) (2) may affect the rights of investors in holding companies in violation of the Fifth Amendment, and stated:

> "Our decision in *North American Co.* v. *Securities & Exch. Commission*, *supra*, largely disposes of the objections to §11 (b) (2) on the basis of the due process clause of the Fifth Amendment.
>
> "Section 11 (b) (2), like §11 (b) (1), materially affects many property interests of holding companies and their investors; * * *. But Congress carefully considered these various interests and found them 'outweighed by the political and general economic desirability of breaking up concentrations of financial power in the utility field too big to be effectively regulated in the interest of either the consumer or the investor and too big to permit the functioning of democratic institutions'. It is not our function to reweigh these diverse factors or to question the conclusion reached by Congress. Nor can we say that §11 (b) (2) on its face authorizes or necessarily involves any destruction of any valuable interests without just compensation. The legislative policy and the statutory safeguards pointed out in the *North American* case negative that argument" (329 U. S. 106).

Thus, the constitutional issue, which has been raised in the Central-Illinois cross-petition (at p. 5) and the White opposition brief (at p. 8) has in reality been resolved.

II. In Reply to Common Stockholders' Briefs in Opposition to Streeter Petition.

A. As to Contentions Respecting the Function of a Section 11(e) Court vis-a-vis the Commission.

The laborious efforts of the common stockholders to confuse the issues prove unavailing. The erroneous contention is made by the common stockholders that there is no conflict among the courts of appeals with respect to the scope of review by a section 11(e) court as to the fairness and equity of a plan.[27]

At the outset, it must be pointed out that the common stockholders' assertion that the conflict between the District Court and the Commission relates primarily to the legal conclusions and not the factual findings of the Commission[28] clearly contradicts the District Court's definite rejection of "such findings and conclusions of the Commission [that] relate to or bear upon the payments of premiums or are inconsistent with the Opinion dated May 15, 1947 or with the findings and conclusions of law filed with said Order"[29] (R. 293a-294a). The foregoing evidence of the District Court's disagreement with the Commission's findings brings into focus the issue as to the status of the Commission's findings or the treatment to be accorded them by the district court in the performance of its function under section 11(e).

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[27] Central-Illinois opposition brief, p. 13 ff.; White opposition brief, p. 15.

[28] Central-Illinois opposition brief, p. 9; White opposition brief, p. 17.

[29] It can hardly be fairly claimed that the District Court's findings Nos. 36-38 (R. 307a-308a) are consistent with the Commission's findings (R. 69a-72a). The failure to recognize the conflict between the District Court's and Commission's findings is suprising as Central-Illinois counsel apparently prepared the findings for the District Judge (R. 377a, 385a).

The Commission's findings, in respect to the value of the preferred claim (with which the District Court disagrees) are "in the realm not of mathematical demonstration, but of forecast, based upon expert analysis and weighting of a complex array of factors, in which the informed judgment of the Commission counts heavily".[30] Therefore, those findings, according to the decisions in the First, Second and Eighth Circuit Courts should not be upset, if supported by substantial evidence or unless "shown to be without a rational basis in fact or to be predicated upon a clear-cut error of law".[31] In the aforesaid three circuits, the scope of review by a section 11(e) court is delineated in terms of the doctrines of substantial evidence and administrative finality. Contrariwise, the two courts below have in effect viewed the section 11(e) enforcement proceedings as substantially a trial *de novo*.[32] Under that approach, a section 11(e) court is at liberty to exercise its affirmative and independent duty to examine the evidence as if *de novo* (Cf. R. 26) and make findings of fairness, and is then free to reject the Commission's findings, even if supported by substantial evidence and even if possessing a rational basis in fact and based upon a reasonable

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[30] *Lahti* v. *New England Power Ass'n*, 160 F. (2d) 845, 851 (C. C. A. 1, 1947).

[31] *Lahti* v. *New England Power Ass'n, supra; Public Service Commission of N. Y.* v. *S. E. C.*, 166 F. (2d) 784, 788 (C. C. A. 2, 1948); *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945) cert. den. 327 U. S. 795 (1946). See Streeter petition, pp. 17-20.

[32] In the same spirit the decision below erroneously sustains the right of a section 11(e) court to reopen the administrative record and receive additional evidence respecting the fairness and equity of a plan (R. 26). Such unlimited reopening of the administrative record is contrary to the weight of authority. See Streeter petition, pp. 23-24. Also see *In re Eastern Minnesota Power Corp.*, C. C. H., Fed. Sec. Serv., Par. 90,399-1 (D. Minn., 1947), *infra*, at p. 19, n. 39.

view of the law. Thus the views of the two courts below are clearly in conflict with those of the First, Second and Eighth Circuit Courts.

It would seem that the Central-Illinois group implicitly recognizes that the First and Eighth Circuit Courts sustains the district court's application of the doctrine of substantial evidence and administrative finality in testing the Commission's findings as distinguished from a "trial *de novo*" approach or the principle of the so-called "independent check",[33] but contends[34] that these appellate holdings "cannot be

[33] This criterion of "independent check" is apparently the same as the "full and independent judgment" established by the court below under which a section 11(e) court is free to reject administrative findings in disregard of the doctrine of substantial evidence and administrative finality. However, an entirely different significance has been ascribed to the concept of "independent judgment" in *St. Joseph Stockyards* v. *U. S.*, 298 U. S. 38, 53 (1936), where this Court in a confiscation case stated:

> "* * * this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency."

It is thus apparent that the issue concerns the extent to which a district court is free to reject or is required to accept the findings of an administrative agency based upon substantial evidence or possessing a rational and statutory foundation.

[34] Any attempted distinction by the common stock groups based upon the presence of the concurrent approval of both the District Court and the Commission in the *Lahti* and *Massachusetts Mutual* cases and its absence in the instant case is also lacking in merit. We maintain that that difference in result is attributable to the difference in the treatment accorded the findings of the Commission by the section 11(e) district courts in the First and Eighth Circuits, as contrasted with the Third Circuit, and would not have

[Footnote continued on following page.]

construed as holdings that the district courts are *required* in performing their statutory function to approve and enforce determinations of the Commission which they deem erroneous".[35] No such contention has been made. Instead, the Streeter group have urged that under the prevailing appellate view, the section 11(e) district courts must in performing their statutory duty sustain the administrative findings unless shown to be without rational basis in fact or to be predicated upon a clear-cut error of law. Such standard of review conflicts with the doctrine of the district courts' "full and independent judgment" implying a trial *de novo,* as announced by the two courts below.

The Central-Illinois group also claims that "the 'essence of the holdings of both Courts below was that the Commission's *conclusions* are without substantial evidentiary or legal basis; or, stated in restrictive terms for which Petitioners contend, that they 'lack rational or statutory foundation' ".[36] To no avail does it seek to convey the impression that the courts below applied the doctrines of substantial evidence and administrative finality. The ready answer to such

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[Footnote continued from preceding page.]

occurred in the instant case if the District Court had applied, or had been directed by the court below to apply, the correct standard for testing the Commission's findings.

The Central-Illinois effort (opposition brief, p. 13, n. 18) to discredit the recognition by the court below that the cited decisions "look the other way", as not based upon "an independent analysis of the decisions themselves", discloses incredible omniscience that can hardly be accepted in the light of a fair and independent examination of the opinion below and the "searching and detailed analysis" asserted by Central-Illinois to have been made by the court below in another respect.

[35] Central-Illinois opposition brief, pp. 13-14.

[36] *Sic.* Central-Illinois opposition brief, p. 9.

attempt is the language of the court below when it said:

> "In the light of the foregoing we *cannot hold*, as the Commission contends we must, that unless the conclusions of the Commission lack rational or statutory foundation they may not be disturbed by the Section 11(e) court, or that a reversal of the Commission's judgment by the court may not be effected save where the Commission has plainly abused its discretion" (R. 34). (Italics ours.)
>
> "* * * The Court [in the second *Chenery* case] stated that its duty of examination is at an end '* * * when it becomes evident that the Commission's action is based upon substantial evidence and is consistent with the authority granted by Congress * * *' *Ibid.* at p. 207. The Chenery decision in our opinion cannot be deemed to be controlling in the case at bar" (R. 33).

On the other hand, the White group urge as a distinction that, in the instant case, the court below, in its review, considered the "function of the District Court *vis-a-vis* the Commission" while in the *Lahti* and *Massachusetts Mutual* cases, the "Circuit Court was acting only as a review court and was bound by the findings of fact of both the District Court and the Commission".[37] The attempted distinction is devoid of merit. In both the case at bar and the *Lahti* and *Massachusetts Mutual* cases, the status of the Commission's findings or the treatment to be accorded them by a section 11(e) district court was at stake, and consequently, affected the relative function of the district court and the Commission. Reference to the opinions of the respective District and Circuit Courts confirms the fact that the standard to be used by a section 11(e)

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[37] White opposition brief, p. 15.

court in reviewing the Commission's action was involved and also that a conflict exists with respect to the standards enunciated among the circuits.[38] Further confirmation of this conflict appears in two recent[39] District Court decisions within the First and Eighth Circuits, decided since the filing of the Streeter petition, both of which cite the opinion of the court

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[38] Despite the contrary assertion by the White group, additional evidence appears that the function of the district court was in issue in the *Massachusetts Mutual* case. Thus in the recent decision in *In the Matter of Northern States Power Company*, unreported, decided August 30, 1948 (D. 4th D. Minn.) Civil Action No. 2673, the District Judge, after quoting the "rational basis" statement from the *Massachusetts Mutual* case, recites the contentions apparently unsuccessfully urged by the appellant in that case as follows:

> "'Section 11(e) of the Public Utility Holding Company Act of 1935 requires the District Court to independently determine whether the plan is fair and equitable and appropriate to effectuate the provisions of Section 11 of the Act. The Court cannot, as it has done here, abdicate this independent duty to the Securities and Exchange Commission.'
>
> * * * *
>
> "'The Court below failed to exercise the independent judgment required of it by the Act. Instead it completely accepted, and felt itself bound by, the conclusions of the Commission, which at best are advisory only.'". (Mimeographed opinion, p. 15).

The District Court then commented: "The weight, therefore, that the Court should attach to the Commission's factual findings was directly before the Circuit Court in that case * * *."

[39] Nor can the Third Circuit's view be reconciled with the acceptance of the substantial evidence rule in earlier decisions of District Courts within the First and Eighth Circuits. *In re Eastern Minnesota Power Corp.*, C. C. H. Fed. Sec. Service, par. 90,399-1 (D. Minn., 1947); *In re New England Public Service Company*, 73 F. Supp. 452, 456 (D. Me., 1947). For example, in the *Eastern Minnesota* case, *supra*, the District Judge said:

> "* * * The power of the Court is too limited and circumscribed to set aside the Findings and Order of the Commission on the record here controlling. The Court cannot exercise any general supervision of the Commission, nor can it direct the administrating of the Act. *City of North Miami Beach, Fla. v. Federal Water & Gas Corp. et al.*, 151 F. 2d 420.

[Footnote continued on following page.]

below and note the difference in the standard enunciated in their own respective circuits as contrasted with that of the Third Circuit.[40] *In the Matter of Northern States Power Company,* unreported, decided August 30, 1948, Civil Action No. 2673 (D. 4th D. Minn.); *American and Foreign Power Company,* unreported, decided Sept. 21, 1948, Civil Action No. 490 (D. S. D. Me.): Thus in the *Northern States Power Company* case, *supra,* where the contentions were made that "the court should reject the Commission's valuations and estimates and forecasts * * * regardless of the fact that there may be substantial evidence in support of the Commission's findings" and that "the findings of fact of the Commission supported by substantial evidence are not binding upon the court although such findings should be treated with respect",[41] the District Judge (Norbye, *J.*) notes the Third Circuit's rejection of the administrative finality doctrine and comments as follows:

"* * * But Judge Biggs' decision in that case

[Footnote continued from preceding page.]

"That a contrary conclusion may have been reached by the Court if the Act permitted a hearing *de novo* is of no avail to objectors. Nor is the wisdom of the conclusion reached by the Commission of any concern of the Court. *Board of Trade* v. *United States,* 314 U. S. 534. The duty of the Court ends if the record submitted in the present case is convincing that it supports the findings of the Commission by substantial evidence, consistent with the authority granted by Congress, *National Broadcasting Co., Inc.* v. *United States,* 319 U. S. 190. The record of the instant case, in my opinion, will not permit a finding that the Amended Plan was not fair and equitable. *Mass. etc. Co.* v. *S. E. C.* (8 C. C. A.) 151 F. 2d 424" (at pp. 91, 100-101 of the Service).

[40] Central-Illinois in its citation of these two recent cases (opposition brief, p. 14, n. 21) glosses over the difference in views between the circuits. Nor can a resort to phraseology such as "independent duty" hide that difference.

[41] The District Court in the *Northern States Power Company* case refused to accept these contentions which were apparently urged upon the basis of the opinion below.

must be considered by this Court in the light of the particular facts and circumstances therein involved, and by his recognition that *Lahti* v. *New England Power Association*, 1 Cir., 160 F. 2d 845, and *Massachusetts Mutual Life Ins. Co.* v. *S. E. C.*, 8 Cir., 151 F. 2d 424, in affirming *In re Laclede Gas Light Co.*, D. C. E. D. Mo., 57 F. Supp. 997, 'look the other way.' Presumably, Judge Biggs had reference to Judge Thomas' statement in the *Massachusetts Mutual Life Ins. Co.* case (p. 430, 151 F. 2d). * * * [quotation from *Massachusetts Mutual* case omitted and also the recital of appellant's contentions in that case, quoted *supra* p. 19, n. 38].

* * * *

"The weight, therefore, that the Court should attach to the Commission's factual findings was directly before the Circuit Court in that case, and it seems clear that the view of the Eighth Circuit is that such findings should be given considerable weight where there is a rational basis therefor, particularly where it appears that the Commission has given its careful and conscientious consideration to the many complex and involved questions presented by the record. * * * The limited authority vested in the Court, which has either to approve or disapprove the plan, would seem to lend weight to the *soundness of the views of the Eighth Circuit as to the duty of a Section 11(e) court where there is a 'rational basis' for the Commission's findings.* * * *

"I conclude, therefore, that the exercise of my independent judgment in passing upon the fairness of the plan to the parties involved must be made in recognition of the experience, skill and facilities of the Commission in considering and appraising the facts before it in the lengthy hearings and voluminous testimony during the past

five years. *Due weight should be accorded its findings and conclusions in factual matters where there is substantial evidence in support thereof.*" (Italics ours.) (Typewritten opinion, pp. 15, 16, 17.)

Similarly in the *American and Foreign Power Company* case, *supra*, which arose within the First Circuit, the District Court refers to the attitudes of the First, Third and Eighth Circuits as enunciated in *Lahti, Engineers* and *Massachusetts Mutual* cases and discussion of them in the recent *Northern States Power Company* case, *supra*, from which it quotes, and then concludes as follows:

> "While this Court is not convinced that there is any real difference between not acting 'capriciously' (to use the words of Judge Biggs in the *Engineers* case) and recognizing a 'range of tolerance' (to use Judge Magruder's language in the *Lahti* case) it should of course look *primarily to standards set forth in this Circuit.*" (Italics ours.) (Mimeographed opinion, p. 15.)

It is apparent from the foregoing recent District Court decisions within the First and Eighth Circuits that the standard within these two circuits differs from that applied in the Third Circuit respecting the extent to which a section 11(e) court is bound by findings of the Commission supported by substantial evidence or having a rational and statutory basis. Moreover, that difference is sufficiently substantial so as to result in the approval or disapproval of a section 11(e) plan dependent upon the circuit in which its enforcement is sought. The opinion of the court below has thus generated confusion which this Court should dispel.

B. As to Contentions Regarding the Valuation Process.

Numerous broad statements of fact and law appear in the opposition briefs that are lacking in basis and merit. Accordingly, only major contentions will be considered below.

1. Significance of fair and equitable standard.

The fair and equitable standard in a simplication under the Act under the *Otis* principles requires full compensation for senior securities for the contract rights surrendered on a "going concern" and not liquidation basis prior to the payment of junior securities.[42] On the other hand, the court below, in its approach to the problem of valuation, stresses the nebulous criteria of "factors" and "equities" clearly extrinsic to the contract rights in the light of the supposed termination of the enterprise. It is thus readily apparent that the views of the court below conflict with the principles of the *Otis* case, as set forth above.

2. Fair investment value doctrine.

The Commission is charged with applying the investment value doctrine in the instant case "to require premiums to be paid to the Engineers' pre-

[42] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624 (1945). In conformance with this mandate, the Commission valued the preferred claim in the light of the applicable charter provisions (such as dividend rate, call prices and liquidation preferences) and an analysis of the financial condition of the company (R. 62a) and refused to hold the charter liquidation provisions (voluntary or involuntary) "conclusive" and to permit the Act to transform the existing value of the security in a going concern into a matured claim. The Central-Illinois contention (opposition brief, p. 18) that the Commission clearly ignored the charter liquidation provisions is groundless. The court below recognized that the Commission had properly considered them as not "dispositive" (R. 34).

ferreds" without even the "slightest reference" to an alleged long line of decisions denying "premiums" under the fair and equitable standard of section 11(e).[43] Apart from the inaccurate characterization of "premiums" for an amount "at least equal to the respective call prices", which was found by the Commission to be the fair investment value of the preferreds (R. 67a-68a), that assertion by the Central-Illinois group is distortional[44] and groundless like many of its other misstatements. It completely disregards the Commission's citation, in its Findings and Opinion (R. 67a), of the *American Power & Light Co.*, H. C. A. R. No. 6176 p. 11 ff. (1945), in which the Commission adequately distinguished the so-called frustration cases and accordingly, had no further reason to discuss them in the instant case. Moreover, despite any contrary implication from the Central-Illinois assertion, the Commission and the courts have in many section 11(e) cases permitted companies voluntarily to retire senior securities at amounts in excess of 100.[45] But even if by the so-called frustra-

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[43] Central-Illinois opposition brief, pp. 15-18. Also see White opposition brief, p. 14.

[44] Torn from its context by Central-Illinois is the claimed concession of the Commission with respect to precedents supporting the retirement of bonds and preferred stocks without payment of the call prices. Contrast the Commission's statement in its petition, p. 9 with the Central-Illinois distortion in its opposition brief, p. 15.

[45] For example, *The Western Public Service Co.*, H. C. A. R. Nos. 3175, 3230, 3245 (1942) and *El Paso Electric Co.* (Delaware), 8 S. E. C. 366 (1941), which were subsidiaries of Engineers; *Mississippi River Power Co.*, H. C. A. R. No. 5776 (1945); *The North American Co.*, H. C. A. R. No. 5796 (1945); *Minnesota Power and Light Co.*, H. C. A. R. No. 5850 (1945); *NY PA NJ Utilities Co.*, H. C. A. R. No. 5975 (1945); *Buffalo, Niagara and Eastern Power Corp.*, H. C. A. R. No. 6083 (1945); *Pennsylvania Power & Light Co.*, H. C. A. R. No. 6167 (1945);

[Footnote continued on following page.]

tion cases, the Commission is deemed to have announced an automatic rule denying the payment of any amount in excess of face or stated value, then its decision in *American Power & Light Co.*, H. C. A. R. No. 6176 (1945) certainly constituted the announcement and application a new principle based upon administrative experience under the Act. In that case the Commission said:

> "* * * As a result of the experience gained through consideration of a large number of later cases, we are persuaded that an automatic rule of 100 in all debt retirement cases would produce inequitable results and that it is necessary to inquire into the circumstances of the particular case to determine whether the payment of 100 is fair and equitable" (H. C. A. R. No. 6176, p. 12).

Hence, the Commission's decision in the instant case was merely an extension of the above principle to the retirement of the preferred stock. In its application

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[Footnote continued from preceding page.]

Standard Gas and Electric Co., H. C. A. R. No. 6435 (1946), following the decision in *Standard Gas & Electric Co.*, 63 F. Supp. 876 (D. Del. 1945); *Community Gas & Power Co.*, H. C. A. R. No. 6436 (1946); *Scranton Spring-Brook Water Service Co.*, H. C. A. R. No. 6458 (1946); *Northern States Power Co.*, H. C. A. R. No. 6578 (1946); *Pennsylvania Edison Co.*, H. C. A. R. No. 6723 (1946); *Washington Railway & Electric Co.*, H. C. A. R. No. 7410 (1947), enforced June 16, 1947 (D. C. Dist. of Col.); *United Gas Corp.*, 58 F. Supp. 501 (D. Del. 1944); *Central & Southwest Utilities Co.*, 66 F. Supp. 690 (D. Del. 1943); *In the Matter of American and Foreign Power Company*, unreported, decided Sept 21, 1948 (D. S. D. Me.) Civil Action No. 490.

Several cases have also pointed out that in some situations the Commission might find the equitable equivalent of the senior securities to be more than the face amount. See e. g. *Mass. Mutual Life Ins. Co.* v. *S. E. C.*, 151 F. (2d) 424, 430 (C. C. A. 8, 1945); *In re Consolidated Electric & Gas Co.*, 55 F. Supp. 211, 216 (D. Del., 1944); *In re North Continent Utilities Corp.*, 54 F. Supp. 527, 530 (D. Del., 1944).

of this new principle, if it be a new principle, the Commission's action is to be tested like any ordinary administrative order and is not to be disturbed except for plain abuse of discretion by the Commission since based upon an "informed, expert judgment of the problem".[46]

Thus, once the automatic denial of an amount in excess of face is no longer the rule, it is incumbent upon the Commission to determine the fair and equitable payment. As the liquidation provisions are not determinative in a simplification under the Act, the Commission measures the investment worth of the securities, based on the bundle of rights surrendered.[47] This investment value doctrine, whether novel or not, has recently received judicial sanction within the First Circuit. Thus, in *In the Matter of American and Foreign Company*, unreported, decided Sept. 21, 1948 (D. S. D. Me.), Civil Action No. 490, the District Court said with reference to the values assigned to certain preferred stocks under a section 11(e) plan:

> "* * * But it is clear that the Commission arrived at these figures not from a conception that this was a 'call' but from a *consideration of what was the fair investment value of these stocks*, in accordance with the overriding policy of *Otis & Co. v. S. E. C.*, 323 U. S. 624." (Italics ours.) (Mimeographed Opinion, p. 30.)

Such acceptance of the investment value doctrine in the First Circuit cannot be reconciled with its rejection in the Third Circuit.

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[46] *S. E. C. v. Chenery Corp.*, 332 U. S. 194, 207 (1947), rehearing denied, 332 U. S. 783 (1947).

[47] Streeter petition, pp. 42-43.

3. Bankruptcy and equity reorganization precedents.

The Central-Illinois group also asserts that the bankruptcy and liquidation decisions do not support payments to senior security holders of amounts "in excess of their contract claims".[48] This assertion is inapplicable here. In the first place, any inference that the preferred are seeking more than their contract claims is unwarranted as well as "question-begging", for the basic issue is the value of these contract claims. In fact, the Commission has limited the amount of the preferred compensation by the call provision of the charter (R. 67a). In the second place, any implication that the involuntary liquidation provision of the charter is controlling in the instant case so as to limit the preferred claim to face value is contrary to the *Otis* principle that the charter liquidation provisions are inoperative in simplifications under the Act. Lastly, while contract liquidation provisions are inchoate and not controlling in simplifications under the Act so as to require valuation of the contract rights, the contract liquidation provisions are choate or matured in bankruptcy and equity reorganizations and hence conclusive as to the amount to be paid.[49] Moreover if the Act were permitted to mature the preferred claim, as Central-Illinois seems to suggest, then the Act would create a windfall to the common since the Commission has found the fair investment value of the preferred claim at least equal to the call price or in excess of the involuntary liquidation amount and has concluded that the payment of such amount is

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48 Central-Illinois opposition brief, p. 24.

49 As stated in the *Otis* case, "Congress did not intend that its exercise of power to simplify should mature rights, created without regard to the possibility of simplification of system structure, which otherwise would only arise by voluntary action of stockholders or, involuntarily, through action of creditors" (323 U. S. 638).

fair and equitable. Such windfall or shift in values is to be avoided[50] and is certainly not sanctioned by the doctrine of rescission which Central-Illinois claims to be applicable to the instant situation.[51] The Central-Illinois quotation of this principle is most eloquent by virtue of what is omitted. The statement in its entirety is set forth below, with the part omitted by Central-Illinois in italics:

> "Since there is no fault on either side, the loss due to impossibility or frustration must lie where it falls. Neither party can be compelled to pay for the other's disappointed expectations. *But on the other hand, neither can be allowed to profit by the situation.*"[52]

Furthermore, since in the event of rescission, there are no governing provisions in the charter and the parties represent *ownership* interests, an appraisal was in order and, in line with the requirements of "strict priority" and "fairness and equity", the Commission properly found the fair investment value of the preferred to be an amount at least equal to the call price.

4. Continuance of the holding company "enterprise" and "system".

The court below also considered highly significant the supposed termination of the holding company enterprise in the instant case as contrasted with its alleged continuance in the *United Light & Power Company* reorganization, in which there was merely

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[50] *Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 637 (1945); *American Power and Light Co.*, H. C. A. R. No. 6176, p. 8 (1945).

[51] Central-Illinois opposition brief, pp. 18-19.

[52] American Law Institute, *Restatement of the Law of Contracts*, Sec. 468 (comment on Subsection 3, p. 887).

a shift of participation in the enterprise from the top holding company to a subsidiary holding company. This attempted distinction which Central-Illinois likewise urges[53] is not valid. Granting *arguendo* that the present Engineers' plan is a "real liquidation" (as contrasted with a "nominal liquidation"), then the claimed distinction disregards the caution of this Court in the *Otis* case: "The reason [for its decision] does not lie in the fact that the business of Power continues in another form. That is true of bankruptcy and equity reorganization". In fact, the Commission viewed the dissolution in the *United Light & Power (Otis)* case as an actual dissolution and not merely the "peeling" off of a company in a holding company system.[54] In any event, a "real liquidation" of the enterprise has not occurred in the instant case, for the business of Engineers' continues in the operating companies which are now owned directly by the common stockholders instead of indirectly since the elimination of Engineers' (R. 1397a).[55]

Likewise any inference from the views of the court below that the applicability of the *Otis* case depends upon the continuation of the underlying holding company system (which was the fact in the *United Light & Power* reorganization) does not stand analysis.

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[53] Central-Illinois opposition brief, p. 26.

[54] In the reorganization of Puget Sound Power & Light Co., a former subsidiary of Engineers', the Commission referred to its views in the *United Light & Power* decision (13 S. E. C. 1, H. C. A. R. No. 4215) (1943) as follows: "These views were expressed in the course of our discussion of a proposal which contemplated an actual liquidation" [13 S. E. C. 226, 246 (1943)].

[55] In *American Power & Light Company* v. *S. E. C.*, 329 U. S. 90, 117 (1946), this Court has pointed out that the dissolution of a holding company means little more than the receipt of securities of the operating company in lieu of their present shares in the holding company.

The *Otis* rule has in fact been applied in simplification proceedings under section 11, regardless of whether or not there has been a continuing holding company system.[56] Moreover, the emphasis upon the continuation of the holding company system, if carried to its logical conclusion, places a premium upon the sequence of simplification and makes stockholders' rights contingent upon the procedure of system adjustment. But such procedural decisions should not affect rights any more than the selection of a particular method of system adjustment, as this Court cautioned in the *Otis* case.

Conclusion.

I. The remand for valuation was proper, assuming *arguendo* a correct disapproval of the plan by the District Court. The decision below in respect to the remand is in accordance with the applicable decisions of this Court and other courts of appeals. Furthermore, the constitutional questions have been settled. For these reasons, the cross-petition (No. 266) for writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

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[56] For example, in *Puget Sound Power & Light Company*, 13 S. E. C. 226 (1943), Puget Sound had no holding company system beneath it when Engineers filed the plan for it. Also in *Southern Colorado Power Co.*, H. C. A. R. No. 4501 (1943), enforced in Civil Action No. 670 (D. Colo., 1944), aff'd sub. nom., *Disman v. S. E. C.*, 147 F. (2d) 679 (C. C. A. 10, 1945), cert. den. 325 U. S. 863 (1945), the holding company interest was wiped out so that Southern Colorado was no longer in a holding company system. Also see *Northern States Power Co.* (Del.), H. C. A. R. No. 5745, p. 21 (1945), where the Commission appropriately said: "While the plan contemplates a formal dissolution of Delaware as a separate corporate entity, the actual business enterprise represented by the securities of Delaware, is being continued."

II. The opinions of the courts below are in conflict with decisions of the First, Second and Eighth Circuits respecting the function of a section 11(e) court vis-a-vis the Commission. The decision below has also made uncertain the status of the Commission's findings. In addition, the views of the courts below conflict with the applicable decisions of this Court and other courts of appeals as to the significance of the fair and equitable standard. For these reasons as set forth above and previously presented, the petition (No. 227) for writ of certiorari to the Court of Appeals for the Third Circuit should be granted.

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Respectfully submitted,

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